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Frequently Asked Questions Concerning the Public Bidding and Prevailing Wage Requirements of New Jersey Charter Schools

1. Are charter schools required to comply with New Jersey public bidding requirements for construction projects?

Yes. The rules and regulations governing the financial operations of charter schools located in New Jersey are contained in Section 6A:23-9 of the New Jersey Administrative Code, which provides that the board of trustees of a charter school shall be subject to the New Jersey Public School Contracts Law as contained in N.J.S.A. 18A:18A-1 et seq. Pursuant to the Public School Contracts Law, certain contracts for goods and services must be advertised for and subjected to public bidding, and, subject to certain exemptions, thereafter awarded to the lowest bidder. This public bidding requirement applies not only to the board of education of a school district, but also to the board of trustees of a charter school.

2. If so, when are charter schools required to comply with New Jersey public bidding laws?

Every contract by the board of trustees of a charter school for the performance of goods or services, the cost of which in the aggregate exceeds the bid threshold amount (currently **\$21,000**), must be awarded to the lowest responsible bidder after public advertising for bids and bidding in accordance with the Public School Contracts Law. The **public contracting rules apply whether or not charter schools own the property** on which the school is operated at the time of the bid.

Specifically, the Public School Contracts Law requires that: (i) there must be public advertising for bids, and (ii) the contract be awarded to the lowest responsible bidder. For purposes of the Public School Contracts Law, “lowest responsible bidder” means any bidder: (1) whose response to a request for bids offers the lowest price and is responsive, and (2) who is able to complete the contract in accordance with its requirements. However, a contractor who otherwise would be the “lowest responsible bidder” may be disqualified if it is found that any school board, or the New Jersey Economic Development Authority (in the case of a school facilities project), had a prior negative experience.

Following is a link to the text of the Public School Contracts Law, as maintained on the web site of the New Jersey Department of Community Affairs:

http://www.state.nj.us/dca/lgs/lpcl/stat_refs/pscl_18a_18a-1.shtml

EXAMPLE: If a landlord builds out space for a charter school and total construction costs are greater than \$21,000 must the construction project be publicly bid?

This answer will depend on the particular facts of the situation. Generally, any agency, corporation, person or entity that enters into a contract or agreement on behalf of a charter school to provide services must be subject to the Public Schools Contract Law. In addition, as stated above, every contract by the board of trustees of a charter school for the performance of goods or services, the cost

of which in the aggregate exceeds the bid threshold amount (currently \$21,000), must be awarded to the lowest responsible bidder after public advertising for bids and bidding in accordance with the Public School Contracts Law. The example in Section 6 below gives some additional analysis of this issue.

3. Does the physical size of the project determine whether the contract will be subject to the bidding provisions of the Public School Contracts Law? For example, if a school is planning to renovate a smaller space (e.g., less than 19,500 sq. ft.), does it need to comply with the bidding requirements?

The physical size of the renovation project does not govern whether the public bidding requirements must be applied. Instead, the “bid threshold amount” determines whether a contract must be submitted to public bidding. The current bid threshold amount is \$21,000, except with respect to contracts for public school student transportation, which is \$15,000, and in certain cases a higher amount may be allowed if the school has appointed a Qualified Purchasing Agent. Accordingly, any contract awarded by a purchasing agent that does not in the aggregate exceed \$21,000 (\$15,000 for student transportation contracts) in a contract year, will not be subject to the public bidding requirements. Additional information about bid threshold amounts can be found at the following link: <http://www.state.nj.us/dca/lgs/lfns/05lfns/2005-16.doc>

4. Regardless of whether compliance with the bidding laws is required, does the contractor hired by the school need to pay prevailing wages?

Although the public bidding requirements may not be applicable if a project is below the bid threshold amount, a charter school nonetheless must take into consideration the New Jersey Prevailing Wage Act as, N.J.S.A. 34:11-56.25, et seq. The Prevailing Wage Act affects prime contractors and subcontractors performing “public work” contracts (as defined in Question 6 below) awarded by the state or a political subdivision thereof, including the board of trustees of a charter school. In short, the Prevailing Wage Act requires that workers receive at least a minimum hourly rate based on their craft, as determined by the Commissioner of Labor and Workforce Development. If the board of trustees of a charter school awards a contract to a contractor, whether through the public bidding process or pursuant to an exemption from such requirement, the wages paid to the employees of the contractor must be in conformity with the requirements set forth in the Prevailing Wage Act. Question 6 below provides more information regarding the application of prevailing wage rates to a charter school project.

The following link, to the website of the New Jersey Department of Labor and Workforce Development, provides an FAQ section about prevailing wage rates: <http://www.state.nj.us/labor/lse/lspwfaq.html>.

5. What makes a bid a public bid? How does a contractor bid on a project?

Except as provided in N.J.S.A. 18A:18A-55 (relating to minority and small-business contracts), to promote competitive bidding all advertisements for bids must be published in an “official newspaper” sufficiently in advance of the date fixed for receiving the bids, but in no event less than 10 days prior to such date. The term “official newspaper” means any newspaper designated by the board of trustees, provided that the newspaper has been continuously printed and published in the English language within New Jersey at least once a week for the past year. The advertisement shall designate the manner of submitting and receiving bids, as well as the time and place at which bids will be received. At such time and place, the bids shall be publicly received by the purchasing agent of the board of trustees, unsealed and the contents thereof publicly announced in the presence of any currently bidding parties. The board of trustees shall record all

bids in the minutes of the board and no bids shall be received after the time designated in the advertisement.

To bid on a request, each interested vendor shall submit a proposal which shall include all information required by the request for proposals. The provisions of a proposal are not subject to negotiation.

Contracts are awarded by resolution of the board of education within 60 days of the receipt of the proposals and the secretary of the board shall publish a notice in the official newspaper of the board summarizing the award of the contract.

6. What is meant by the term “Prevailing Wage”?

"Prevailing Wage" means the wage rate paid, by virtue of collective bargaining agreements, by employers employing a majority of workers of the same craft or trade subject to said collective bargaining agreements, in the locality in which the public work is done. The purpose of the prevailing wage is to ensure that construction workers, carpenters, plumbers, etc. who work on “public work” contracts (defined in Section 6 below) are paid the going rate for their services and to maintain fair competition. Official prevailing wage determinations are issued by the New Jersey Department of Labor and Workforce Development, Division of Wage and Hour Compliance, Public Contracts Section, for specific projects by requests of contracting public entities. To acquire official Prevailing Wage rates for a specific project, the charter school must submit an application to the New Jersey Department of Labor. The following link provides information to apply for and download an official New Jersey Prevailing Wage Rate Determination: <https://wnjpin.state.nj.us/pw/prevwage.html>.

Although public entities are required to contact the New Jersey Department of Labor for an official determination of the prevailing wage rates for a specific project, general prevailing wage determinations for counties in New Jersey can be found at the following link <http://www.nj.gov/labor/lsse/wagerate.htm>.

The NJ State Prevailing Wage Act & Regulations can be found at the following link to the website of the N.J. Department of Labor: <http://www.nj.gov/labor/lsse/prevailingwage.html>.

7. When must the Prevailing Wage be paid?

Every contract that meets all of the following requirements shall contain a provision stating the prevailing wage rate which can be paid (as shall be designated by the commissioner) to the workers employed in the performance of the contract and the contract shall contain a stipulation that such workers shall be paid not less than such prevailing wage rate:

(a) The contract is between a “public body” and a contractor, or is for “public work” (defined in (b) below) to be done on property or premises leased or to be leased by a public body. The term “public body” includes charter schools;

(b) The contract is for the performance of “public work,” which is defined as construction, reconstruction, demolition, alteration, custom fabrication, repair work or maintenance work done under contract and paid for in whole or in part out of the funds of a public body; and also includes construction, reconstruction, demolition, alteration, custom fabrication, or repair work done on any property or premises, whether or not the work is paid for from public funds, if, at the time of the entering into of the contract:

(i) At least 55% of the property or premises is leased by a public body, or is subject to an agreement to be subsequently leased by the public body; **and**

(ii) The portion of the property or premises that is leased or subject to an agreement to be subsequently leased by the public body measures more than 20,000 square feet; **and**

(c) The total value of the contract is in excess of \$2,000, if the work is being done for any other public entity, including boards of education and municipal utility authorities, or \$11,892 (subject to adjustment pursuant to the Act), if the work is being done for a municipality.

Following is a link to the prevailing wage rate FAQs of the website of the N.J. Department of Labor:
<http://www.state.nj.us/labor/lssc/lspwfaq.html>.

EXAMPLE: A charter school plans to rent 19,500 square feet in a building with total square footage of 60,000 s.f. The remaining space is leased by private parties. The charter school would like the owner of the building to build out the space to be occupied by the charter school and the charter school and the building owner plan to enter into a long term lease that will include specifications for the build out. The construction costs for the build out are estimated to be \$1,000,000. The owner is a private party.

a. Does the construction contract for the foregoing example need to be publicly bid and is so, why? Actually, in this example the lease with the property owner contains the agreement to perform the construction, and therefore the lease would need to be publicly bid because (i) it is a contract by the charter school for the performance of goods or services and (ii) the cost of such goods or services, in the aggregate, will exceed \$21,000 (the current bid threshold).

b. Do prevailing wages need to be paid for the construction work and if so, why? Yes, if the work will be paid for by public funds. This is because the agreement is for “public work”. In this example, if private funds are to be used to pay for the construction work, prevailing wages will not need to be paid because the portion of the property to be leased by the charter school is less than 55% of the total property.

c. Who is responsible for bidding the project, the school or the property owner? It is the school’s responsibility to bid the construction work.

8. Can any contractor bid on my charter school’s project? Does the contractor need to be certified or qualified by the state or another accrediting body? If so, what makes a contractor qualified?

No contractor shall bid on a contract for public work unless it is registered under The Public Works Contractor Registration Act as set forth in N.J.S.A. 34:11-56.48 et seq. An application from the N.J. Department of Labor’s website can be found at <http://www.state.nj.us/labor/lssc/forms/lssc-2.pdf>. Furthermore, contractors must also comply with applicable health and safety laws. In addition, the State Treasurer of New Jersey may set reasonable qualifications for prospective bidders on contracts for public works. Qualifications may be set according to the financial ability and experience of the bidders, and the capital and equipment available to them, provided that they are reasonably related to the category of service to be provided in the contract. A contractor able to complete the contract in accordance with its requirements, including but not limited to the requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit and workforce, equipment and facilities available, will be deemed able to acquire the contract.

To demonstrate financial capacity, the bidder must submit a certified financial statement, including applicable notes, reflecting the bidder's assets, liabilities, net worth, revenues, expense, profit or loss and cash flow for the most recent calendar year or the bidder's most recent fiscal year; or if a certified financial statement is not available, then either a reviewed or compiled statement from an independent accountant setting forth the same information required for the certified financial statement. In addition, the bidder must submit a bank reference.

9. Must the charter school always use the lowest bidder? What if another bidder appears to be more qualified or experienced for the job?

The purpose of the public bidding requirement is to protect the public interest by keeping costs at a minimum and preventing fraud. New Jersey law requires that the lowest responsible bidder be chosen subsequent to public advertising. However, the board of trustees of a charter school may disqualify a bidder, who otherwise would be the lowest responsible bidder, if the board finds that any board of education, or the New Jersey Economic Development Authority, had a prior negative experience with the bidder within the last 10 years. A board of trustees also may reject a bid for any of the following reasons:

- (a) The lowest bid substantially exceeds the cost estimates for the goods or services;
- (b) The lowest bid substantially exceeds the board of trustees's appropriation for the services;
- (c) The board of trustees decides to abandon the project for provision or performance of the goods or services;
- (d) The board of trustees wants to substantially revise the specifications for the goods or services;
- (e) The purposes or provisions of the Public School Contracts Law are being violated.
- (f) The board of trustees decides to use a State authorized contract.

10. If a third party (e.g. a separate 501(c)3 entity or a for-profit design build company) is constructing my school facility for purchase or rent, does it need to follow the public bidding laws and Prevailing Wage requirements?

The answer is generally yes, however the outcome is highly dependant on the facts of the particular situation. In such a situation, the New Jersey Department of Education (NJDOE) has taken a position on this issue. In connection with its audit of certain aspects of the operations of the Red Bank Charter School, the NJDOE determined that the school and the Red Bank Charter School Foundation were in essence the same organization and that the foundation was subject to the same restrictions and limitations as the school. In the Red Bank matter the foundation incurred debt and entered into contracts for renovation for school, property. The NJDOE determined the activities of the foundation were in violation of public bidding requirements and required the school to refund over one million dollars to the State. Accordingly, a charter school should assume that the Public School Contracts Law and the Prevailing Wage Act would apply to third parties, unless the NJDOE or counsel has advised otherwise.

11. As a charter school, what are my responsibilities with respect to public bidding and the payment of prevailing wages? How much follow up does a charter school need to do once a contractor has been selected?

For purposes of the Public School Contracts Law, a charter school board of trustees is the equivalent of a board of education and must comply with all requirements of a board of education, including, without limitation, the supervision of school building repairs and inspection of work and materials. **With respect to the Prevailing Wage Act, a charter school is considered a public body** and contractors who do repair work for charter schools must comply with the prevailing wage rates, as well as comply with all other requirements for public bodies under such act.

Repairs of all charter school buildings shall be supervised by the business manager of the district, if there is one. If no business manager, the board may delegate such power to any appropriate officer of the board.

Certified payroll records must be submitted to the charter school (public body) for each employee on the project. The general contractor is responsible for ensuring that each sub-contractor submits the certified payroll within ten days of the payment of wages. The charter school's business manager shall receive, file and make available for inspection during normal business hours the certified payroll records. Other than the foregoing, and inserting specific requirements in the contract (see Question 6), the charter school is not required to ensure that the contractor and any subcontractors are abiding by the Prevailing Wage Act requirements. A link to the payroll certification form can be found at: http://www.state.nj.us/njbusiness/wmb/workforce/whc/pre_wage.shtml.

12. Can a charter school own real property in its own name?

Yes. The New Jersey Charter School Program Act of 1995, N.J.S.A. 18A:36-1 et seq., permits charter schools to acquire real property from public or private sources, by purchase, lease, lease with an option to purchase, or by gift, for use as a school facility.

13. May a charter school borrow money?

Yes, subject to certain limitations. A charter school may incur debt for a period no greater than 12 months except:

(1) during the first year that a charter school is approved when the debt is incurred by the charter school for a period no longer than January 15 of the preceding school year to June 30 of the first school year of the charter; and

(2) for all other years that a charter school is approved when the debt incurred by the charter school for a period of 12 months or greater is fully secured by the value of the real property or other asset, so that the total value of all such debt does not exceed the total appraised value of the property or asset by which the debt is secured and is non-recourse to the charter school. N.J.A.C. 6A:23-9.6

Additional FAQs regarding charter schools are included in Appendix H of the New Jersey Charter School Application Form, which can be accessed by the following link:
<http://www.state.nj.us/njded/chartsch/app/docs/faq.doc>

Additional public contracting information may be found at the following site:
<http://www.state.nj.us/dca/lgs/lpcl/index.shtml#ContractsLaw>

Disclaimer

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